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Supreme Court, U.S.
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No. 02-1824

In the Supreme Court of the United States

JANIE COCKRELL, DIRECTOR,
TEXAS DEPARTMENT OF CRIMINAL JUSTICE,
INSTITUTIONAL DIVISION,
Petitioner,

v.

MICHAEL WAYNE HALEY,
Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

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ARGUMENT

The Director's petition for writ of certiorari raises an important issue of federal law that has generated a significant and well-developed circuit split. Haley concedes (1) the courts of appeals are split (although he attempts to diminish the severity of the split by pointing out irrelevant procedural differences in the cases); (2) the importance of the issue; and (3) that there are no factual disputes or procedural hurdles to impede the Court's ability to resolve the issue presented. Accordingly, the Court should grant the petition to resolve this important issue of federal law that has so deeply divided the courts of appeals.

I. THE COURT SHOULD RESOLVE THE CIRCUIT SPLIT REGARDING WHETHER THE "ACTUAL INNOCENCE" EXCEPTION TO THE PROCEDURAL BAR RULE APPLIES TO NONCAPITAL SENTENCING ERROR.

The question whether the "actual innocence" exception to the procedural bar rule applies to noncapital sentencing phase error has plagued the courts of appeals for over a decade. It has so far split six circuits in three ways. The conflict shows no signs of resolving itself, but instead appears destined to become only more entrenched.

Nevertheless, in an attempt to dissuade the Court from granting the petition, Haley incorrectly contends that the split is not sufficiently developed to warrant this Court's attention. Resp., at 2. Haley bases his claim on the rather unremarkable fact that the procedural settings of the various cases creating the split are not identical. Resp., at 2-6. Haley points out that three of the decisions behind the persistent conflict—*United States v. Mikalajunas*, 186 F.3d 490 (CA4 1999), *Embrey v. Hershberger*, 131 F.3d 739 (CA8 1997) (en banc), and *Hope*

v. United States, 108 F.3d 119 (CA7 1997)—involved motions pursuant to 28 U.S.C. §2255, rather than 28 U.S.C. §2254. Resp., at 2. And, he notes that *Embrey* and *Hope* concerned the application of the "actual innocence" exception to successive petitions rather than procedurally defaulted claims. *Id.*, at 3.

The distinctions identified by Haley do not diminish the disagreement between the circuits, nor do they support his suggestion that the issue should be allowed to percolate further in the courts of appeals.

A. The Courts of Appeals's Use of the "Actual Innocence" Exception Under 28 U.S.C. §2254 Is Identical to that Under 28 U.S.C. §2255.

Haley's erroneous suggestion that the division among the courts of appeals is not sufficiently developed to warrant the Court's attention rests on the false premise that the "actual innocence" exception varies depending upon whether the writ is brought under 28 U.S.C. §2254 (state custody) or 28 U.S.C. §2255 (federal custody). However, the Court has never distinguished between "actual innocence" as it pertains to §2254 cases and those arising under §2255. Neither have the courts of appeals perceived such a distinction. For example, in *Embrey*, a §2255 case, the Eighth Circuit applied the Court's "actual innocence" doctrine developed in *Sawyer v. Whitley*, 505 U.S. 333 (1992), and *Smith v. Murray*, 477 U.S. 527 (1986)—which were both §2254 cases—with no indication that a different standard should apply. Indeed, Haley does not cite a single case making this distinction.

And while it may be true that in a §2255 case, a federal habeas court is not constrained by the federalism concerns present in a §2254 case, that distinction has no bearing on the application of the "actual innocence" exception. *See McClesky v. Zant*, 499 U.S. 467, 493 (1991) (noting that although the abusive-of-the-writ doctrine may not always implicate federalism concerns, as the procedural default doctrine generally does, the same miscarriage of justice standard , *i.e.*, the "actual innocence" exception, applies in both contexts). The mere distinction of the two procedural settings does not diminish the clarity and steadfastness of the courts of appeals's disagreement.

B. The "Actual Innocence" Exception Applies Equally to Procedurally Defaulted Claims and to Claims Barred by the Abuse-of-the-Writ Doctrine.

Haley's claim that a different "actual innocence" standard may apply to successive petitions, as opposed to procedurally barred claims, is likewise refuted by the Court's "actual innocence" jurisprudence. The Court held in *McClesky* that the miscarriage of justice exception—also known as the "actual innocence" exception—applies equally to successive writs as it does to procedurally barred claims. *Id.*, at 493-95.

Indeed, the Court left no room for speculating, as Haley does, that the law may be otherwise. Observing that "[t]he doctrines of procedural default and abuse of the writ implicate nearly identical concerns flowing from the significant costs of federal habeas corpus review," *id.*, at 490-91, the Court held that the principles behind the application of the "actual innocence" exception do not differ when used to excuse a procedural default or to avoid a bar on successive petitions.

See id., at 493. Indeed, "the unity of structure and purpose in the jurisprudence of state procedural defaults and abuse of the writ" requires that "the standard for excusing a failure to raise a claim at the appropriate time should be the same in both contexts." *Id*; *cf. Sawyer*, 505 U.S., at 335 (framing the issue presented as "whether a petitioner bringing a *successive*, abusive, or *defaulted* federal habeas claim has shown he is 'actually innocent' of the death penalty . . . so that the court may reach the merits of the claim") (emphasis added).

The principle of "actual innocence" applies equally to the various contexts identified by Haley and no court has never held otherwise. The fact that the "actual innocence" exception is available in several areas of habeas law only serves to highlight the importance of the question whether it should be extended to noncapital sentencing error. The conflict in the courts of appeals is real, well-developed, and deserving of resolution by this Court.

II. This Case Squarely Presents an Issue That Requires Resolution.

Haley does not, and cannot, take issue with the description of this case by the dissent from the denial of rehearing en banc, as one of a "purely legal question . . . unsullied by factual disputes . . . [that] squarely presents a legal question of exceptional importance in an unusually pristine form." *Haley v. Cockrell*, 325 F.3d 569, 570 (CA5 2003) (Smith, J., dissenting). Instead, Haley urges the Court to deny the Director's petition and defer resolution of this issue until the Court is presented with a case that does not involve application of a habitual offender statute, or one in which the habeas petitioner was not improperly sentenced.

The Court should reject Haley's invitation to delay review of this issue. Waiting for a noncapital case that does not implicate a habitual offender statute is not only unnecessary, but it would be unadvisable because it would introduce more uncertainty into this area of the law. A decision by the Court in this case that the "actual innocence" exception does not excuse a procedurally defaulted claim would govern cases not involving habitual offender statutes, thus providing a clear rule that is not limited by its particular circumstances.

By contrast, waiting for a noncapital case that involves a non-habitual offender statute would result in a decision of limited utility. If the Court were to resolve the issue presented by such a case, the availability of the exception in the context of habitual offender statutes would remain an open question and a divisive issue among the courts of appeals. The Court should not decide this issue piecemeal. It should grant the petition in this case to provide a single rule concerning the "actual innocence" exception in noncapital sentencing.

Similarly, the Court should not, as Haley suggests, await a case in which the habeas petitioner was not improperly sentenced. Such a case would likely be encumbered with fact disputes that are not present in this case.

This case squarely presents the question whether the "actual innocence" exception will excuse a procedurally defaulted claim that a noncapital sentence was wrongfully applied. The Court should grant the petition and resolve this important and unsettled question of federal law.

CONCLUSION

The Court should grant the petition for writ of certiorari.

Respectfully submitted,

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